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No. 91-52

Supreme Court, U.S.
FILED
AUG 2 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

In the Matter of the Application of
SHIRLEY MIDDLETON,

Petitioner,

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services, WILLIAM J. GRINKER (as successor to HARVEY ROBINS), Commissioner of the New York City Department of Social Services,

Respondents.

BRIEF OF RESPONDENT WILLIAM J. GRINKER IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does petitioner's allegation that the New York City Department of Social Services failed to comply with a "Decision After Fair Hearing" by the State Department of Social Services, ordering the City Agency to provide petitioner and only petitioner with food stamp benefits, standing alone without any claim or showing that the City Agency had a policy or practice of failing to timely comply with State Fair Hearing Decisions, raise a substantial federal claim warranting an award of attorneys' fees under 42 U.S.C. §1988?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

In the Matter of the Application of
SHIRLEY MIDDLETON,

Petitioner,

For a Judgment Pursuant to Article 78 of the C.P.L.R.

-against-

CESAR PERALES, as Commissioner of the New York State Department of Social Services, WILLIAM J. GRINKER (as successor to HARVEY ROBINS), Commissioner of the New York City Department of Social Services,

Respondents.

BRIEF OF RESPONDENT WILLIAM J. GRINKER IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

STATEMENT OF THE CASE

Petitioner, Shirley Middleton (hereafter referred to as "petitioner") was a recipient

of public assistance in the Aid to Dependent Children category. She had two children of her own and three foster children. She was also authorized to participate in the Food Stamp Program. In December, 1985, petitioner received $148 in food stamps.

After December, 1985, petitioner received no further food stamps. She alleged that she received no notice from New York City's Department of Social Services ("Agency") that her food stamps were to be discontinued. On June 24, 1986, at petitioner's request, a "fair hearing" was held to review "a determination by the agency relating to the discontinuance of an Authorization to Participate in the Food Stamp Program and the adequacy of a grant of Aid to Dependent Children." On August 18, 1986, the Commissioner of the State Department of Social Services issued a "Decision After Fair Hearing." App.

10a-12a.[1] The Commissioner found that the Agency's determination to discontinue petitioner's authorization to participate in the Food Stamp Program was based on petitioner's failure to provide paystubs of her 20-year-old daughter and social security numbers for her three foster children. App. 10a. Finding that the Agency had not requested the information, the Commissioner directed it to restore Food Stamp benefits to petitioner retroactive to the date of discontinuance "in accordance with the verified degree of need." App. 11a.

On September 5, 1986, petitioner's attorney wrote to the Compliance Section of the State Department of Social Services stating that the Agency had not implemented

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[1] Numbers preceded by the letters "App." refer to the pages of the appendix to the Petition For a Writ of Certiorari.

the decision of the Commissioner. The Compliance Unit responded on September 12, 1986 indicating that the matter would be reviewed by the local agency.

On November 8, 1986, the Agency, by way of a memorandum to the Fair Hearing Monitoring Section, stated that it was not providing food stamps because petitioner had been sent two notices apprising her of the discontinuance of food stamps on January 9, 1986 and March 13, 1986. These notices stated that the "necessary documentation" had not been provided by petitioner. App. 13a. In addition, the Agency, as per the Commissioner's decision of August 18, 1986, had verified petitioner's degree of need and found "that [the] family is not eligible for Food Stamp benefits." App. 13a.

On November 14, 1986, petitioner brought a proceeding pursuant to Article 78 of the New York Civil Practice Law and

Rules seeking an order directing the Agency to comply with the Commissioner's Fair Hearing Decision of August 18, 1986.

The Agency did not interpose an answer. According to petitioner, however, it did inform her counsel on January 6, 1987 that "the agency intended to comply with the hearing decision by issuing petitioner's retroactive food stamps to her, and providing her with ongoing food stamp benefits for as long as she was entitled thereto." The same date petitioner informed her attorney that she received over $900 in retroactive food stamps. On February 3, 1986, petitioner withdrew her Article 78 proceeding from the court calendar.

However, on December 24, 1986, the Agency issued petitioner a notice of intent to discontinue food stamps because "you failed to verify your household's foster care and SSI income ..." Thereafter, petitioner

requested another administrative hearing. The hearing was held on March 9, 1987 and on April 15, 1987. Thereafter, the Commissioner issued a Decision After a Fair Hearing and reversed the Agency's notice of December 24 to discontinue benefits because it was not in compliance with the Decision of August 18, 1986. App. 14a-17a. The Agency was directed to provide Food Stamp benefits to petitioner retroactive to the date of the Agency's action. App. 17a.

On May 20, 1987, petitioner moved to restore her Article 78 proceeding to the calendar because the Agency "apparently" discontinued petitioner's food stamps without notice. On June 1, 1987, the Agency issued another notice of intent to discontinue food stamps because of petitioner's failure to submit verification of household income.

On July 7, 1987, the Agency submitted an Affirmation in Opposition to petitioner's

motion to restore the Article 78 proceeding to the calendar. It was the Agency's view that pursuant to 18 NYCRR 387.10(b)(2)(ii), foster care payments must be included in calculating a household's income for purpose of determining eligibility for food stamps. Petitioner receives $993.00 in income and $91.00 in clothing allowance per month for her three foster children, thereby rendering her ineligible for food stamp assistance.

1. **The Supreme Court's Opinion**

By Order and Judgment dated August 6, 1987, the Supreme Court, New York (Vaccaro, J.) ordered the Agency to comply with the fair hearing decisions of August 18, 1986 and April 15, 1987. App. 19a.

Regarding petitioner's application for attorney's fees, the trial court concluded that she was the prevailing party in her claim to an allotment of food stamps pursuant to 7 U.S.C. Chapter 51, and as such, was

entitled to an award of reasonable fees pursuant to 42 U.S.C. §1988.

The trial court awarded attorney's fees in the amount of $3,662.50 as against the State. The trial court found that while the "intransigence of the local agency" was responsible for the repeated proceeding, it felt-constrained to dismiss the application for fees as against the Agency on the authority of Matter of Beaudoin v. Toia (Jorczak), 45 N.Y.2d 343, 347, 408 N.Y.S.2d 417, 419, 380 N.E.2d 246, 247-248 (1978).

2. The Appellate Division's Opinion

The Appellate Division of the New York State Supreme Court for the Second Judicial Department rendered a unanimous decision reversing, the Supreme Court's judgment granting petitioner's application for attorney's fees. App. 2a. Middleton v. Perales, 160 A.D.2d 800, 554 N.Y.S.2d 71 (2d Dept. 1990), appeal denied, 76 N.Y.2d

714, 564 N.Y.S.2d 718, 565 N.E.2d 1269 (1990). The Appellate Division, noting that the underlying proceeding sought to compel the Agency to comply with a "Decision After Fair Hearing" directing the restoration of petitioner's food stamp benefits, ruled that the "controversy dealt with the administrative application of State statutes and regulations (*see*, Social Services Law §22[9]1; §34[3], 18 NYCRR former 358.18[8][1], 358.22)." App. 3a. Id. at 801. The Appellate Division held that "(t)here was no showing by the petitioner of a violation of any constitutional right, or the violation of any right created by federal law (citation omitted)." App. 3a. Id. at 801.

3. Applications For Leave To Appeal

On May 25, 1990, petitioner moved in the Appellate Division, Second Department for leave to appeal to the Court of Appeals

of the State of New York. The application was denied on July 3, 1990. App. 9a.

Thereafter, petitioner sought leave in the Court of Appeals. This motion was denied on December 20, 1990. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioner originally was authorized to receive food stamps. She alleges that after December 1985, her food stamps were discontinued without notice. She requested and was given a hearing to review the determination to discontinue her food stamps. The State Commissioner issued a decision directing the Agency to restore petitioner's stamp benefits retroactive to the date of their discontinuance. When the Agency failed to comply with the directive, petitioner brought her Article 78 proceeding for an order directing the Agency to comply with the decision of respondent Perales. Thus, if

the Agency had complied with the order of the Commissioner, petitioner would have had no basis for her Article 78 proceeding. Petitioner was not aggrieved by a denial of benefits, as the State's decision was in her favor. Rather, petitioner brought an Article 78 proceeding in the nature of a mandamus action to have the court order the Agency to comply with the administrative decision of the State to provide petitioner with food stamp benefits. Petitioner does not allege a conflict with any federal mandate regarding food stamp allotments and state regulations. Petitioner also does not allege an official policy of the State or the Agency or a failure to comply with Federal law or State law or regulations. Rather, petitioner brings her lawsuit predicated on isolated acts of a City agency. Such a claim does not provide the predicate for an attorney's

fee application as against the City Agency or a case worthy of review by this Court.

PETITIONER'S ALLEGATION THAT THE CITY AGENCY FAILED TO COMPLY WITH A STATE FAIR HEARING DECISION DIRECTING THE AGENCY TO PROVIDE PETITIONER WITH FOOD STAMP BENEFITS, WITHOUT A CLAIM THAT THE CITY AGENCY HAD A PRACTICE OR POLICY OF NOT TIMELY COMPLYING WITH STATE FAIR HEARING DECISIONS DOES NOT RAISE A SUBSTANTIAL FEDERAL CLAIM WARRANTING AN AWARD OF ATTORNEYS' FEES.

(1)

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690 (1978), this Court explained that

> the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights....

* * *

> [A] local government may ... be sued under §1983 ... when [it is the] execution of a government's policy or custom ... [that] inflicts the injury. [That is when] the government as an entity is responsible under §1983.

Id at 690, 694. See also, Simpson v. New York City Transit Authority, 112 A.D. 89, 91, 491 N.Y.S.2d 645, 647 (1st Dept. 1985), aff'd, 66 N.Y.2d 1010, 499 N.Y.S.2d 396, 489 N.E.2d 1298 (1985). Moreover, to maintain an action under 42 USC §1983, an individual is required to plead and prove that the official policy or custom is what caused the deprivation of that individual's rights. Batista v. Rodriguez, 702 F.2d 393, 397 (2d. Cir 1983). "'[T]he mere invocation of the 'pattern' or 'plan' [will] not suffice without this causal link.'" Id. at 397. "At the very least there must be an affirmative link between the policy and the particular ... violation alleged." Oklahoma City v.

Tuttle, 471 U.S. 808, 823 (1985). To establish a causal link, it must be shown that an official policy "by its terms" violates an individual's rights; or, in the case of a "more nebulous" policy (i.e., a custom or pattern and practice), it must be shown that it was "a course of action consciously chosen from among various alternatives" that caused the deprivation. Id. at 822-823. While Monell involved a violation of the Equal Protection Clause, there is nothing in the language of Monell or subsequent cases to indicate that its broad holding, requiring proof of official policy in cases brought for "monetary, declaratory, or injunctive relief", should be limited to constitutional questions, and is not applicable to statutory claims.

This Court in Monell also explained that a suit commenced against an individual in his official capacity is "only another way of pleading an action against [the] entity of

which an officer is an agent." Id. at 690, n.55. This Court elaborated on this point in Kentucky v. Graham, 473 U.S. 159 (1985), where it stated that

> in an official-capacity action ... for a governmental entity [to be] liable under §1983 .. the entity itself [must be] a "'moving force'" behind the deprivation [citing cases]...; thus in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

Id. at 166; Oklahoma City, supra, 471 U.S. at 820.

In the case at bar, petitioner commenced her Article 78 proceeding against Cesar Perales as Commissioner of the New York State Department of Social Services, and William Grinker as Commissioner of the New York City Department of Social Services. This is clearly an official-capacity suit, as each official has been sued in his capacity as commissioner. In order to

maintain a §1983 claim, petitioner must do more than merely allege federal statutory and constitutional violations; she must make a showing that the Agency had a policy of failing to comply with State Fair Hearing Decisions. Petitioner has not and cannot establish that this was the Agency's policy on the basis of the isolated incidents alleged in her petition.[2]

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[2] In Moore v. Perales, 85 Civ. 1638 (CPS), memorandum opinion and order, (E.D.N.Y. June 27, 1988), on a motion for partial summary judgement, the District Court considered the New York City Department of Social Service's compliance with Fair Hearing Decisions in cases involving Aid to Families with Dependent Children ("AFDC") and food stamps. The Court found that from February 1986 to February 1987, the Agency complied in 95% of AFDC cases within 30 days as required by law, and in 90% of food stamp cases within 10 days as required by law. The Court also noted that the Agency is taking steps to further improve its performance. Slip op. at 9. Compare, Haskins v. Stanton, 794 F.2d 1273, 1276 (7th Cir. 1986).

(2)

Undaunted, petitioner, under the veil of a supremacy clause argument, asserts that her claim was based on the violation of a federal statute by respondents. This view misconstrues the nature of the action at bar.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court held that the plain language of §1983 embraces claims based on violations of federal statute alone. Id. at 4. This Court also held that attorney's fees may be awarded to the prevailing party under 42 USC §1988 ("§1988") in such §1983 actions based on statutory violations. Id. at 9. There, the respondents, who were recipients of AFDC benefits, challenged the State's method of computing their benefits. Id. at 3. Attorney's fees were granted because the State's regulations were in conflict with the federal Social Security Act, and thus, amounted to an official policy that operated

to deprive families of rights secured by federal statute. Id. at 3; Oklahoma City, supra, 471 U.S. at 822. Since this case involves only a failure of compliance, it is governed by State regulation, and there has been no violation by the Agency of federal law or regulation.[3]

In Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984), the Court of Appeals for the Second Circuit considered a §1983 action based on an alleged federal statutory violation. The plaintiff's claim was based on a violation of a state regulation governing Medicaid reimbursement promulgated in

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[3] In this context, it is worth noting that petitioner's prayer for relief only requests judgment (1) directing the Agency respondent to comply with the State respondent's hearing decision; (2) directing the Agency respondent to restore petitioner's food stamp immediately; and 3) directing the State respondent to "supervise and monitor the agency to assure its compliance with the said hearing decision."

conformity with the federal Medicaid statute and regulations. The plaintiff argued that this was "ipso facto a violation of federal Medicaid laws and regulations." Id. at 119. The Circuit Court "reject[ed] this tortuous argument", and found that

> there is no authority anywhere supporting the proposition that a state ... regulation becomes a federal law merely by virtue of its inclusion in a state plan required by federal law ....

Id. at 119. In dismissing the statutory claim the Circuit Court held that to be the basis of a §1983 action there must be "a specific conflict between a state plan or practice on the one hand and a federal mandate on the other." Id. at 119, citing cases; Mont v. Heintz, 849 F.2d 704, 709 (2d Cir. 1988); Friedman v. Perales, 616 F.Supp 1363, 1369 (S.D.N.Y. 1985). There has been no allegation in this case that the state regulations in any way conflict with federal

mandate, and it was shown that the Agency has a specific policy of adhering to those regulations. See, Gelin v. Perales, 149 A.D.2d 593, 595, 540 N.Y.S. 2d 275, 277 (2d Dept. 1989).

(3)

Lastly, we note that in certain cases fees may be granted on State grounds if petitioner seeks relief on both State grounds and Federal grounds. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966). The "two-pronged Gibbs test" is the same as the test for pendent jurisdiction. It permits an award of attorney's fees if (1) the federal claim has substance sufficient to confer subject matter jurisdiction, and (2) the federal and non-federal claims derive from a common nucleus of operative fact. The determination of the federal claim's substantiality is based on whether it is "wholly insubstantial",

"obviously frivolous", or "obviously without merit." See, Matter of Johnson v. Blum, supra, 58 N.Y.2d at 458 n. 2, 461 N.Y.S. 2d 782, 783, 448 N.E.2d 449, 450 (1983), citing, Hagans v. Lavine, 415 U.S. 528, 537-538 (1974).

Here, although it appears that petitioner's state and federal claims derive from a common nucleus of operative facts, petitioner's federal claims fail to meet the substantiality requirement. In cases involving cooperatively funded public welfare programs, "failure to comply with State regulations, without more, does not implicate an interest secured by the laws of the United States." Matter of Misuraca v. Perales, 120 A.D.2d 592, 593-594, 501 N.Y.S.2d 907, 909 (2d Dept 1986). Instead, a claim is stated under Section 1983 only when a conflict between the state plan (or a state practice) and federal law is alleged.

Oberlander v Perales, supra, 740 F.2d at 119.

The petition in this case alleges no such conflict between state law or practice and federal law. Similarly, in those cases relied on by petitioner for her ominous assertion that the Appellate Division, Second Department of the State of New York "is refusing to take cognizance of substantial federal claims," the moving parties did not allege that state laws or practices did not comply or conflict with federal mandates; rather, each case was based on an allegation of an isolated incident concerning the Agency's failure to abide by a state regulation. See, Thomasel v. Perales, 161 A.D.2d 646, 647, 555 N.Y.S.2d 423 (2d Dept. 1990); Cruz v. Perales, 158 A.D.2d 597, 551 N.Y.S.2d 568, 569 (2d Dept. 1990); Rashid v. Perales, 156 A.D.2d 692, 549 N.Y.S.2d 166, 167 (2d Dept. 1989); Rozier

v. Perales, 149 A.D.2d 710, 540 N.Y.S.2d 504, 505 (2d Dept. 1987), appeal denied, 74 N.Y.2d 993, 550 N.Y.S.2d 274, 549 N.E.2d 476 (1989). Stringing these matters together as petitioner has, neither raises a claim of an unconstitutional Agency practice or pattern, nor a substantial constitutional question worthy of review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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July 30, 1991.